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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 RANDALL J. SLOAN, an individual,
13 Plaintiff,

14 vs.

15 PFIZER, INC., a Delaware corporation; and
16 DOES 1 through 40, inclusive,

17 Defendants.

Case No. CV-08-1849 SBA

**PFIZER, INC.'S REPLY TO
PLAINTIFF'S OPPOSITION TO PFIZER,
INC.'S MOTION TO TRANSFER VENUE
[28 U.S.C. §1404(a)]**

*[Declaration of Thomas Kelly, Evidentiary
Objections and [Proposed] Order filed
concurrently herewith.]*

Date: July 29, 2008

Time: 1:00 p.m.

Ctrm.: 3; 3rd Fl.

DJ: Hon. Sandra B. Armstrong

Case Removed to Federal Court: 4/7/2008

18 **I. INTRODUCTION**

19 Plaintiff does not refute that the majority of witnesses (including several of his personal
20 treating physicians) and almost all the documentary evidence are located in New York. Plaintiff
21 does not refute that virtually all the operative acts relative to this case occurred in New York.
22 Although plaintiff surreptitiously moved to California in September 2005, he, at all times,
23 remained an employee of Pfizer's New York office. Plaintiff maintained his affiliation with
24 Pfizer's New York office by filing a workers' compensation claim with the State of New York in
25 October 2005 and by submitting expense reports in February 2006 indicating the department
26 within which he worked was located in New York.
27
28

As virtually all the witnesses and evidence are located in New York and all the operative facts occurred in New York, plaintiff must focus on the hardship that may result if this matter is transferred New York. However, as evidenced by the case law in plaintiff's opposition, the parties' financial means is a relatively minor factor when considering a motion to transfer. Furthermore, even less consideration is given to a party's medical condition. Pfizer strongly refutes that medical and financial conditions alone constitute grounds for denying a motion to transfer. However, even assuming these factors were sufficient, plaintiff has not provided admissible evidence to support these claims. Rather, plaintiff simply offers his counsel's declaration containing extremely vague statements that amount to inadmissible hearsay and lack foundation and first-hand knowledge.

On balance, the factors for considering a motion to transfer heavily favor granting Pfizer's motion, as plaintiff has not provided a sufficient factual or legal basis for retaining this matter in California.

II. ARGUMENT

A. Plaintiff's Claim of Hardship Does Not Preclude Granting Transfer.

Plaintiff argues that Pfizer's motion to transfer this action to a proper venue in the Southern District of New York should be denied due to his alleged financial and medical conditions. Plaintiff fails to provide the legal authority to support his contentions. Plaintiff also fails to produce admissible evidence of his alleged financial and medical conditions. Plaintiff's only proffered evidence is his counsel's declaration, the majority of which contains inadmissible hearsay and statements lacking first-hand knowledge and foundation. (See Pfizer's Evidentiary Objections to Declaration of Daniel Iannitelli in Support of Opposition to Motion to Transfer Venue, pp. 1-2.)

1. Plaintiff Overstates Authority for Denying Transfer Due to Financial Hardship.

Plaintiff contends that he will endure a financial hardship if he is required to litigate this matter in New York. [Opposition at 3:16-18.] To begin, the fact that the majority of plaintiff's witnesses (including some of his third-party treating physicians and psychiatrists) and

1 documentary evidence are located in New York militates in favor of trying the case in New York
2 – even from a financial perspective. Notwithstanding this reality, plaintiff’s purported financial
3 means alone is not enough to defeat Pfizer’s motion to transfer. In fact, Plaintiff has failed to
4 provide authority which focuses on plaintiff’s or defendant’s financial condition as a basis for
5 denying a motion to transfer. As stated in *Dwyer v. General Motors Corp.*, 853 F. Supp. 690,
6 693-694 (SD NY 1994), a case relied upon in plaintiff’s opposition, the court *may also* take into
7 account the relative means of the parties in deciding a transfer motion, but this factor is only one
8 of many to consider (emphasis added). [Id. at 693.]

9 In *Dwyer*, a product’s liability action against a Michigan-based automotive corporation,
10 defendant sought to transfer the matter from New York to Maryland. In finding the factor of
11 monetary expense favored plaintiff, the court noted that the Michigan-based defendant would
12 have to travel to defend this case even if its motion were granted. In fact, the financial condition
13 of the parties was a relatively minor consideration in this case as the court focused on at least
14 *seven* other factors. [Id. at 692-695.] The court further reasoned that given the causes of action
15 for breach of warranty, negligence and strict liability, the focus of the case would be on
16 defendant’s business decisions in the areas of marketing, design and testing, which would most
17 likely be found in the company headquarters in Michigan. With a majority of operative facts
18 occurring outside of Maryland and the majority of records and others sources of proof for the
19 determination of liability on the product located in Michigan, the court denied defendant’s motion
20 to transfer. [Id. at 694.] In short, the court focused on the location of witnesses and evidence, not
21 the financial means of the parties, in considering defendant’s motion.

22 Unlike *Dwyer*, the locus of operative facts (decisions related to plaintiff’s employment,
23 the majority of alleged discriminatory and retaliatory acts against plaintiff and the investigation of
24 these matters, consideration of plaintiff’s accommodation request and determination of plaintiff’s
25 temporary work restrictions and disability benefits), the records and other sources of proof, and
26 Defendant’s headquarters are all located in New York – the venue to which Pfizer requests this
27 matter be transferred. In light of these significant differences, *Dwyer* does not apply to the instant
28 case and fails to advance plaintiff’s position.

1 Plaintiff's reliance on *Advideo, Inc. v. Kimel Broadcast*, 727 F.Supp 1337 (N.D. Cal.
2 1989) is also misplaced. Plaintiff claims that, "the court in *Advideo, Inc.*, looking at the financial
3 conditions being equal, declined to transfer the case even though the wrongful acts and witnesses
4 were located in New York." [Opposition at 4:1-3.] Contrary to plaintiff's recitation of this case,
5 the *Advideo* court reasoned that "prospective witnesses in this case also include plaintiff's
6 California-based employees: those who negotiated the contract with defendant, those who
7 uncovered the alleged unauthorized use of its materials, and those who are familiar with the
8 copyright issues presented by this case." [*Advideo*, at 1342.] Furthermore, *Advideo* involved an
9 action for copyright infringement and breach of contract, wherein "the contract at issue expressly
10 states that legal disputes arising from the contract will be resolved in accordance with California
11 law." [Id. at 1340.]

12 Again, plaintiff misleadingly overstates the court's focus on the parties' financial means in
13 considering this motion to transfer. In *Advideo*, unlike the instant case, the court noted that
14 several key witnesses resided in California and the parties specifically contemplated that any
15 disputes arising from the contract would be governed by California law. [*Advideo*, at 1340-1341.]

16 Here, the majority of key witnesses (including several of plaintiff's treating physicians)
17 are located in New York. Although plaintiff contends several witnesses are located in California
18 (himself and six medical providers who he apparently used since relocating himself to San
19 Francisco without Pfizer's permission), it is unclear why he will need six physicians and medical
20 providers to litigate this action. [Opposition at 2:20-22.] Even assuming these witnesses are not
21 providing duplicative evidence, their testimony will likely pertain only to his alleged emotional
22 distress and disability discrimination claims. Physicians who treated plaintiff in New York will
23 offer testimony more relevant to his putative disability discrimination claims since they would
24 have treated him while he still worked for Pfizer and resided in New York. Plaintiff's claims for
25 gender discrimination, wrongful termination, retaliation and breach of the covenant of good faith
26 and fair dealing do not require medical experts. With the exception of plaintiff, all witnesses with
27 relevant testimony for these claims, including plaintiff's treating doctors who recommended work
28 restrictions, are located in the New York metropolitan area. [See, Pfizer's Memorandum of

1 Points and Authorities in Support of Motion to Transfer Venue, (“Pfizer’s MPA”), at 7:7-15.]

2 Furthermore, it is unclear whether California law is applicable to this matter as plaintiff
 3 signed an employment agreement in New York, wherein plaintiff agreed New York law would
 4 apply to the enforcement, construction and interpretation of the agreement. [See, Buongiorno
 5 Declaration in Support of Motion to Transfer Venue (“Buongiorno Decl.”), ¶6, Ex. B –
 6 Employment Agreement, at ¶ 13, previously filed as part of Pfizer’s moving papers.]

7 Finally, Pfizer questions plaintiff’s contention that he does not have the means to obtain
 8 adequate representation for this matter in New York. [Opposition at 4:9-13.] Plaintiff retained
 9 the New York law firm Reavis Parent Lehrer LLP to represent him when he raised several
 10 employment claims in early 2006. According to the February 2006 demand letter prepared by
 11 Attorney Laurie Leonard on plaintiff’s behalf, this firm has offices in New York City, Los
 12 Angeles, and San Francisco. [See, Declaration of Thomas R. Kelly in Support of Pfizer’s Reply
 13 to Plaintiff’s Opposition to Motion to Transfer Venue, ¶ 2, Exhibit A.] Pfizer does not know if
 14 this firm currently represents plaintiff in any capacity. However, given plaintiff’s past affiliation
 15 with New York counsel, his ability to obtain representation in New York does not appear to
 16 create the significant hardship plaintiff alleges in his opposing papers. Furthermore, nothing
 17 prevents his San Francisco-based counsel from associating qualified New York counsel.

18 **2. Plaintiff Cites No Authority to Support Claim of Medical Hardship.**

19 Plaintiff also claims that it will be extremely difficult for him to litigate this matter in New
 20 York due to his medical condition. [Opposition at 1:21-24.] Plaintiff, however, fails to provide
 21 any authority in which a court denied a motion to transfer based on the non-moving party’s health
 22 condition. In fact, a party’s health condition does not appear to be a prevailing factor when
 23 considering a motion to transfer. Courts in other jurisdictions have denied motions to transfer
 24 when the moving party cited his or her own serious medical condition as a basis for transfer. See,
 25 *Villante v. Vandyke* 2008 U.S. Dist. LEXIS 32647 (ND NY April 21, 2008) (moving party’s
 26 severe kidney disease and chronic hepatitis was not sufficient grounds for transferring matter as
 27 party could travel a few days at a time); *Mason v. Jones* 1992 U.S. Dist. LEXIS 12407 (ND Ill.
 28 August 19, 1992) (interest of justice factor not satisfied by transferring matter to defendant’s

1 residence in Minnesota, despite defendant being a paraplegic and confined to a wheelchair). In
 2 short, no basis exists for denying Pfizer's motion to transfer based on plaintiff's medical
 3 condition.

4 **B. Plaintiff Has Not Refuted the Fact That All Operative Facts Occurred in New York.**

5 Plaintiff argues that his choice of forum should be duly considered because "he worked
 6 approximately 18 months in California, during which time many of the acts on which he bases his
 7 suit occurred." [Opposition at 4:23-25.]

8 Plaintiff's reasoning is flawed for the following reasons. First, plaintiff misrepresents the
 9 nature of his employment situation following his surreptitious move to California in September
 10 2005. Plaintiff unilaterally and without Pfizer's knowledge moved to California in September
 11 2005. Pfizer did not approve plaintiff's *voluntary and temporary* working situation from
 12 California until December 2005 with the understanding that this was a *temporary* situation to help
 13 plaintiff transition back to his position in New York. [Buongiorno Decl., ¶¶ 7 – 8.] Plaintiff was
 14 expected to return to New York by February 2006, but the last day he actually worked was
 15 January 31, 2006. Thus, plaintiff worked approximately five (5) months in California, initially
 16 without Pfizer's knowledge or approval and eventually with the understanding that he would do
 17 so temporarily and transition back to New York. [Buongiorno Decl., at ¶¶ 7 -11.] Plaintiff never
 18 returned to work after the six-week temporary assignment expired as plaintiff went out again on
 19 short-term disability leave. In mid-October 2006, plaintiff's New York-based supervisor James
 20 Crowe notified plaintiff that his New York group was selected for layoffs and he was eligible for
 21 a separation package that would provide "notice pay" until January 8, 2007. Therefore, the actual
 22 circumstances under which plaintiff was voluntarily and temporarily working for Pfizer in
 23 California differ dramatically from plaintiff's portrayal of this situation.

24 Second, plaintiff's opposition does not identify any operative facts that allegedly occurred
 25 *in* California. Plaintiff artfully states that the majority of the acts on which he bases his claims
 26 occurred while Mr. Sloan was working in California, but *he does not say these events took place*
 27 *in California*, nor can he. [Opposition at 1:27 – 2:1.] As set forth in Pfizer's moving papers,
 28 even though plaintiff worked temporarily in California, all decisions regarding his employment

1 were made by managers and supervisors who reside and work in New York.¹ All decisions and
 2 actions relating to evaluating plaintiff's performance, determining his eligibility for disability
 3 benefits, reviewing his accommodation requests, investigating his discrimination complaints, and
 4 selecting personnel for a reduction in force which included plaintiff's work group occurred in
 5 New York. As plaintiff has not refuted Pfizer's contention that none of the operative facts
 6 occurred in California, his choice of forum does not warrant even minimal consideration.

7 **C. The Southern District of New York is Fully Capable of Applying California Law.**

8 Plaintiff argues that because his claims are based solely on California law, this matter
 9 should remain before the California courts. However, assuming *arguendo* that California law
 10 applies, the court in *Dwyer*, a case on which plaintiff depends, held "the fact that the law of
 11 another jurisdiction governs the outcome of the case is a factor accorded little weight on a motion
 12 to transfer." *Dwyer*, 859 F.Supp. at 694.

13 This premise also applies to federal courts applying California law. In *Foster v.*
 14 *Nationwide Mut. Ins. Co.*, the court transferred a wage and hour class action to Ohio, even though
 15 the complaint included supplemental claims arising under California law. The court correctly
 16 stated that although it was more familiar with California law, other federal courts are fully
 17 capable of applying California law. See *Foster v. Nationwide Mut. Ins. Co.*, 2007 U.S. Dist.
 18 LEXIS 95240, *15, *16 (N.D. Cal. Dec. 14, 2007).

19 **III. CONCLUSION**

20 For the aforementioned reasons, Pfizer respectfully requests that this action be transferred
 21 to the Southern District of New York.

22 Dated: July 15, 2008

Respectfully submitted,

JACKSON LEWIS LLP

25 By: /s/ Janine R. Hudson
 26 Mitchell F. Boomer
 27 Janine R. Hudson
 Attorneys for Defendant
 PFIZER, INC.

28 ¹ A majority of these decisions also pre-date plaintiff's unapproved move to California.